

DOCKET FILE COPY ORIGINAL

RECEIVED

MAR 29 1993

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of  
  
Tariff Filing Requirements for  
Nondominant Common Carriers

)  
) CC Docket No. 93-36  
)  
)

COMMENTS OF THE  
NYNEX TELEPHONE COMPANIES

New York Telephone Company  
and  
New England Telephone and  
Telegraph Company

Patrick A. Lee  
Edward E. Niehoff

120 Bloomingdale Road  
White Plains, NY 10605  
914-644-5971

Their Attorneys

Dated: March 29, 1993

No. of Copies rec'd  
1000000

075

## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
I. INTRODUCTION	1
II. TARIFF CONTENT REQUIREMENTS	5
III. TARIFF NOTICE REQUIREMENTS	8
IV. THE LECs SHOULD BE AFFORDED INCREASED	

## SUMMARY

While the Communications Act permits the Commission some degree of flexibility in establishing tariff filing requirements, the NTCs demonstrate in these comments that the further streamlining of tariff filing requirements for nondominant carriers proposed in the NPRM is not consistent with the Act or in the public interest and, therefore, should not be adopted by the Commission. In particular, the proposal to permit tariff filings by nondominant carriers to become effective on one day notice would, as the Commission recognizes, eliminate pre-effective tariff review, resulting in less effective monitoring of tariffs for compliance with the Commission's rules. Furthermore, the proposal to permit nondominant carriers to state in their tariff either a range of rates or a maximum rate does not comply with the requirement of the Act that "every common carrier...file with the Commission...schedules showing all charges for itself and its connecting carriers."

Finally, intense competition has developed in certain of the NTCs' geographic markets, and with respect to certain product and service offerings. Rather than streamlining the already minimal tariff filing requirements for nondominant carriers, the Commission can and should streamline the tariff filing requirements for LECs.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED

MAR 29 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
Tariff Filing Requirements for ) CC Docket No. 93-36  
Nondominant Common Carriers )

COMMENTS OF THE  
NYNEX TELEPHONE COMPANIES

New York Telephone Company ("NYT") and New England Telephone and Telegraph Company ("NET") (collectively, the "NYNEX Telephone Companies" or "NTCs") hereby submit their comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above matter, FCC 93-103, released on February 19, 1993.

I. INTRODUCTION

On November 13, 1992, the United States Court of Appeals for the District of Columbia Circuit, in reviewing a Commission order denying a complaint filed by AT&T against MCI, vacated the Commission's Fourth Report<sup>1</sup> of the Competitive Carrier proceeding.<sup>2</sup> In so doing, the Court invalidated the

---

<sup>1</sup> Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252) (Competitive Carrier); Fourth Report and Order, 95 FCC 2d 554 (1983).

<sup>2</sup> AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), rehearing en banc denied, January 21, 1993.

Commission's "forbearance" policy under which nondominant carriers were permitted to refrain from filing tariffs. The Commission concedes that, in light of the Court's decision, "nondominant carriers are now obligated to file tariffs with the Commission."<sup>3</sup> It has initiated the NPRM to "consider easing in the near term the tariff filing requirement for nondominant carriers in a manner consistent with the Act"<sup>4</sup>

In the NPRM, the Commission tentatively concludes that, "existing tariff regulation of nondominant carriers inhibits price competition, service innovation, entry into the market and the ability of firms to respond quickly to market trends."<sup>5</sup> The Commission further tentatively concludes that "some of our existing streamlined tariff filing requirements are unnecessary for, and burdensome on, nondominant carriers."<sup>6</sup> Based on these policy findings, the Commission tentatively concludes that "the public interest would be served in the near term by streamlining, to the maximum extent possible consistent with our statutory obligations, our tariff regulation of all domestic nondominant carriers."<sup>7</sup>

The Commission requests comment on three principal proposals for changes in the current tariff filing rules for nondominant carriers. First, the Commission proposes to allow

---

<sup>3</sup> NPRM at ¶ 1.

<sup>4</sup> Id. at ¶ 12.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Id. at ¶ 13.

nondominant carriers to file their interstate tariffs on not less than one day notice. The Commission also proposes to reduce tariff content requirements for nondominant carriers by allowing such carriers to state in their tariffs either a maximum rate or a range of rates. Finally, the Commission proposes to provide nondominant carriers with increased flexibility in formatting their tariff filings.

As the NTCs demonstrated in their comments in a related proceeding,<sup>8</sup> while the Communications Act (the "Act") requires all carriers to file rates, the Commission is not required to impose uniform filing requirements on all carriers, in all markets, or for all services. Rather, the Commission may "in its discretion and for good cause"<sup>9</sup> establish different filing requirements, including different tariff review periods and different levels of tariff support, depending on the class of carrier and competitive nature of a particular market.


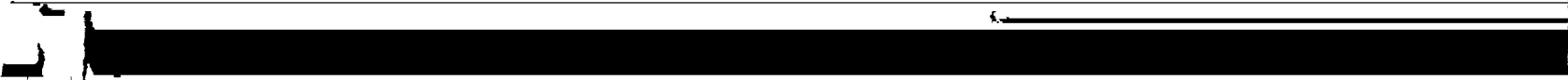


While the Act thus permits the Commission some degree of flexibility in establishing tariff filing requirements, the further streamlining of tariff filing requirements for nondominant carriers proposed in the NPRM is not consistent with the Act or in the public interest and, therefore, should not be adopted by the Commission. In particular, the proposal to permit tariff filings by nondominant carriers to become

---

<sup>8</sup> See, In the Matter of Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Comments of the NYNEX Telephone Companies, dated March 30, 1992.

<sup>9</sup> 47 U.S.C. § 203(b)(2).

effective on one day notice would, as the Commission recognizes, eliminate pre-effective tariff review, resulting in less effective monitoring of tariffs for compliance with the Commission's rules.<sup>10</sup> Furthermore, the proposal to permit nondominant carriers to state in their tariff either a range of rates or a maximum rate does not comply with the requirement of the Act that "every common carrier...file with the Commission...schedules showing all charges for itself and its connecting carriers."<sup>11</sup> For the reasons set forth below,



the tariff filing requirements for LECs. The principles adopted by the Commission in the Competitive Carrier Order<sup>13</sup> which provided increased regulatory flexibility to AT&T for certain of its services, should be expanded to provide comparable regulatory flexibility for the LECs for their services subject to competition.

## II. TARIFF CONTENT REQUIREMENTS

Under the Commission's current streamlined rules, nondominant carriers are required to file schedules of all their rates. They are not, however, required to file cost support information along with their tariffs,<sup>14</sup> and their tariff filings are presumptively lawful.<sup>15</sup>

In the NPRM, the Commission proposes to modify the requirement that nondominant carriers file schedules of all their rates, to instead permit nondominant carriers to state in their tariffs either a maximum rate or a range of rates.<sup>16</sup> According to the Commission, this rule change would alleviate the burden on nondominant carriers who must now "prepare and file new schedules each time they wish to implement minor rate

---

<sup>13</sup> In the Matter of Competition in the Interstate Interexchange Marketplace, 6 F.C.C. Rcd. 5880 (1991) ("Competitive Carrier Order").

<sup>14</sup> 47 C.F.R. §61.38.

<sup>15</sup> See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-25); First Report and Order, 85 FCC 2d 1, 31-33 (1980).

<sup>16</sup> NPRM at ¶ 22.

revisions."<sup>17</sup> The Commission seeks comment on the lawfulness of this proposal and, in particular, whether the proposal complies with the requirements of Section 203(a) of the Act.

The Commission's proposal to permit nondominant

carriers to file tariffs containing either only a maximum rate

filed at all. As is apparent from the recent tariff filings made by a number of competitive access providers ("CAPs"), tariffs containing only maximum prices or minimum/maximum price ranges can be used to deny the Commission, and the carrier's customers and competitors, any meaningful information concerning the prices a CAP is charging for its services.<sup>18</sup>

Moreover, if nondominant carriers are given this degree of flexibility in filing rate information, it will be difficult, if not impossible, for the Commission to monitor compliance by nondominant carriers with the nondiscrimination provisions of Section 202 of the Act.<sup>19</sup> The Commission will not have sufficient information from the tariffs to determine

effectively render meaningless Section 203(c)(1) of the Act.<sup>20</sup> Unless a carrier charged all of its customers the maximum rate or, in the case of a minimum/maximum rate structure, either the minimum or maximum, the carrier would always be charging the customer a different rate than the charges specified in its tariff.

Thus, a rule permitting nondominant carriers to file tariffs containing only maximum rates, or minimum/maximum rates, cannot be implemented in conformance with the Act. At a minimum, all carriers, including nondominant carriers, must file a complete schedule of charges for their services, accurately reflecting the price of those services to the carrier's customers.

### III. TARIFF NOTICE REQUIREMENTS


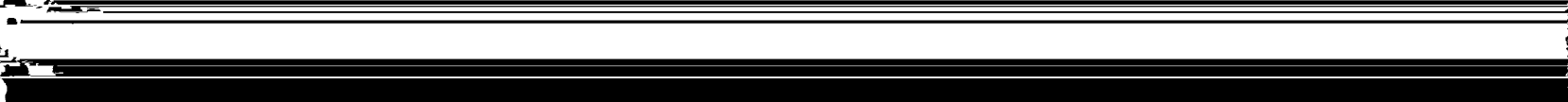
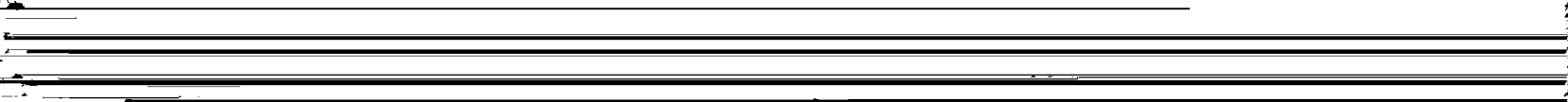
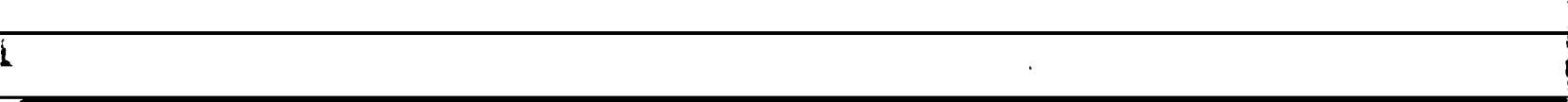


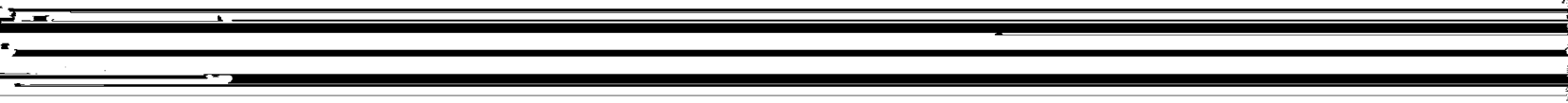


Under the Commission's current rules, tariff filings of nondominant carriers must be filed on not less than fourteen days notice.<sup>21</sup> In its NPRM, the Commission proposes to reduce the notice period for tariff filings by nondominant carriers from fourteen days to one day. The Commission's proposal to shorten the notice period for tariff filings by nondominant carriers is not in the public interest, and should not be adopted by the Commission.

---

<sup>20</sup> Section 203 (c)(1) of the Act provides, in pertinent part, that "no carrier shall (1) charge ... a greater or less or different compensation ... than the charges specified in the schedule then in effect ...".

<sup>21</sup> See 47 C.F.R. §61.58(b).

The Commission acknowledges that the current fourteen day notice period affords the Commission the opportunity, on its own motion or on a petition from an interested party, to



pre-effective tariff review the Commission's rule changes will result in less effective monitoring of tariff filings for legal compliance as well as increased litigation. The Commission's argument that the proposed rule change will have little practical impact because since the streamlined rules were adopted, it has not suspended a tariff filing by a nondominant carrier prior to its taking effect, does not support the proposed Commission action. First, as the Commission itself has admitted,<sup>25</sup> since the institution of the Commission's "forbearance" policy, most nondominant carriers have not filed any tariffs. Thus there have been few nondominant carrier tariff filings for the Commission and other interested parties to consider. With the flood of recent filings by nondominant carriers in response to the Court of Appeals decision in AT&T v. FCC, it will be impossible for the Commission, given its limited resources, to effectively review these many tariff filings either before or after their effective date.<sup>26</sup> The

---

25     See In the Matter of Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking CC Docket No. 92-13, released January 28, 1992 at ¶ 3 ("Today there are in excess of four hundred IXCs that offer common carrier services. Few, if any, of these carriers file tariffs for all of their service offerings, and most do not file any tariffs at all.")

26     The Court's decision in Southern Motor Carriers Rate Conference v. United States, 773 F.2d 1561 (11th Cir. 1985), which is cited by the Commission in support of its authority to reduce notice periods, is not dispositive of this issue. In that case, the Court decided only that the Interstate Commerce Commission ("ICC") had the authority to reduce to one day the notice period for tariff filings reducing rates. The Court did not address the lawfulness of the longer notice period provided by the ICC for tariff filings increasing rates.

inevitable result will be that tariff filings by nondominant carriers will receive no Commission review.

The principal burden of reviewing tariffs filed by nondominant carriers will thus fall on their customers and competitors. If pre-effective review is eliminated, the only vehicle which those parties will have to vindicate their rights will be Section 208 complaints. The complaint process is a poor and inefficient substitute for pre-effective tariff review. For a tariff to be rejected, a petitioner must show that a tariff is patently unlawful, while for suspension a petitioner must show that there is a high probability that the tariff would be found unlawful after investigation.<sup>27</sup> In order to prevail in a complaint proceeding, a complainant bears a higher burden of proof. A complainant must not only show that the challenged tariff is unlawful, but also that it suffered injury as a result. Moreover, unlike pre-effective tariff review, with a Section 208 complaint a complainant must challenge a tariff while it remains effective and the complainant's damages mount. Finally, resolution of formal complaints is typically not a rapid process. Complaints often remain pending for several years before the Commission renders a decision.

In sum, there is no effective substitute for pre-effective tariff review. The Commission should retain its current rule requiring that tariffs of nondominant carriers be filed on not less than fourteen days notice.

---

<sup>27</sup> See 47 C.F.R. §1.773(a)(iv).

IV. THE LECs SHOULD BE AFFORDED INCREASED TARIFF FILING FLEXIBILITY

Finally, as the NTCs demonstrated in their comments in Docket 92-13, and as the Commission has recognized,<sup>28</sup> intense competition has developed in certain of the NTCs' geographic markets, and with respect to certain product and service offerings. For example, the High Capacity Special Access market has become extremely competitive.<sup>29</sup> Among the competitors of the NTCs in this market are nondominant carriers such as MFS and Teleport which, under the Commission's proposed rules, would be subject to even less stringent regulation than today. Rather than streamlining the already minimal tariff filing requirements for nondominant carriers, the Commission should instead streamline the tariff filing requirements for LECs.<sup>30</sup>

---

<sup>28</sup> See In the Matter of Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order, released October 19, 1992 at para. 177 and para. 179 n. 412.

<sup>29</sup> See, In the Matter of Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Comments of the NYNEX Telephone Companies, dated March 30, 1992, at pp. 15-18.


<sup>30</sup> In addition, as the NTCs suggested in their comments in Dockets 91-141 and 92-213, the Commission needs to evaluate the competitiveness of the various access markets. The Commission should require quantitative market information from all common carriers. This data would provide the factual record the Commission needs to tailor its regulatory policies to the degree of competition in each market. (See In the Matter of Transport Rate Structure and Pricing, CC Docket No. 91-213, Reply Comments of the NYNEX Telephone Companies, dated March 19, 1993 at pp. 28-29.)

V. CONCLUSION

For the reasons set forth above, the Commission should not adopt the changes to its tariff filing rules for nondominant carriers proposed in the NPRM.

Respectfully submitted,

New York Telephone Company  
and  
New England Telephone and  
Telegraph Company

By:   
Patrick A. Lee  
Edward E. Niehoff

120 Bloomingdale Road  
White Plains, NY 10605  
914-644-5971

Their Attorneys

Dated: March 29, 1993